

IN THE
Supreme Court of the United States

OCTOBER TERM, 1967

FEDERAL POWER COMMISSION, *Petitioner*,
v.
STANDARD OIL COMPANY OF TEXAS, A DIVISION OF
CHEVRON OIL COMPANY, ET AL., *Respondent*.

On Writs of Certiorari to the United States Court of Appeals
for the Tenth Circuit

OPENING BRIEF OF STANDARD OIL COMPANY
OF TEXAS, RESPONDENT IN NO. 80

FRANCIS R. KIRKHAM
ROBERT H. MORRIS
225 Bush Street
San Francisco, California 94104

JUSTIN R. WOLF
DAVID B. WARD
LOUISE C. POWELL
1625 K Street, N. W.
Washington, D. C. 20006

CLAUDE PROCTOR
P. O. Box 1249
Houston, Texas 77001

*Attorneys for Standard Oil
Company of Texas, a Division
of Chevron Oil Company.*

December 13, 1967

IN THE
Supreme Court of the United States

OCTOBER TERM, 1967

Nos. 60, 61, 62, 80, 97, 111, 143, 144, 231

FEDERAL POWER COMMISSION, *Petitioner*,

v.

STANDARD OIL COMPANY OF TEXAS, A DIVISION OF
CHEVRON OIL COMPANY, ET AL., *Respondent*.

On Writs of Certiorari to the United States Court of Appeals
for the Tenth Circuit

OPENING BRIEF OF STANDARD OIL COMPANY
OF TEXAS, RESPONDENT IN NO. 80

PRELIMINARY STATEMENT

This brief is filed on behalf of Standard Oil Company of Texas, a Division of Chevron Oil Company (Standard), a respondent in No. 80. This case is a companion case to Nos. 60, 61, 62, 97, 111, 143, 144 and 231. Nos. 111, 143, 144 and 231 are separate petitions from

a decision of the Court of Appeals for the District of Columbia. The other cases, from the Tenth Circuit Court of Appeals, arose as follows:

*In a consolidated proceeding seeking permanent certificates for sales of gas from fields in Texas Railroad Commission District No. 4, the Commission, on March 23, 1964—in its Opinion No. 422—ordered permanent certificates at an “in-line” price of 16 cents and severed, for later decision, the question as to whether refunds in respect of sales made under prior temporary certificates would be ordered. Both producers and distributors appealed from this decision. Standard did not challenge the “in-line” price and, therefore, did not participate in that appeal.

Thereafter on July 27, 1966—in its Opinion No. 501—the Commission ordered refunds. Standard and other producers appealed from this decision.

The first appeal to the Court of Appeals (from Commission Opinion No. 422) was decided on December 9, 1966 (I R. 6696-6757). In that decision the Court of Appeals, deeming the refund issue sufficiently before it because of the severance order, decided both the “in-line” price and refund issues. Thereafter, in a *per curiam* opinion filed March 27, 1967, the Court of Appeals decided the refund issue in the second appeal (from Opinion No. 501) on the authority of its earlier decision (II R. 6885-91).

In this Court, Petitions Nos. 60, 61 and 62 seek review of the first decision of the Court of Appeals involving both the “in-line” price and refund issues. Petitions Nos. 80 and 97 (Standard is a party respondent only in No. 80) involve solely the refund question.

STATEMENT OF THE CASE

Standard adopts the questions presented and the statement of the case in the brief filed on behalf of Sunray DX Oil Company, et al., in Nos. 60, 80, et al.

ARGUMENT

Standard adopts the argument on the refund issue in the brief filed on behalf of Sunray DX Oil Company, et al., and respectfully submits the following additional points:

The ruling of the Court below that the Commission lacked power to order refunds under the unconditioned temporary certificates is clearly correct under the principles established by this Court in the *Arizona Grocery* case.¹ In that case this Court held that when a Commission fixes a rate for the future it acts in a quasi-legislative capacity and may not thereafter, acting in its quasi-judicial capacity, retroactively "repeal its own enactment" (284 U.S., p. 289) and award reparations or refunds upon the ground that the rate it fixed was unreasonable.

In the case at bar, the Commission's authorization of the 18 cent price in the temporary certificates was action legislative in character. It approved a rate for the future—in the case of Standard, after reducing the proposed rate on one sale from 19.795 cents to 18 cents per Mcf, and after eliminating a proposed price escalation clause in the contract covering the other sale. The fact that the consideration given by the Commission to the rates under the temporary certificates was not as formal as the consideration which would be given

¹ *Arizona Grocery Co. v. Atchison, T. & S. F. Ry.*, 284 U.S. 370 (1932).

in a hearing on permanent certification, or in a Section 4 or 5 proceeding, does not alter the legislative character of its action. In the *Arizona Grocery* case this Court noted that the Interstate Commerce Commission had held (284 U.S., pp. 382-383):

"We reserve the right, upon a more comprehensive record, to modify our previous findings, upon matters directly in issue before us as to which it clearly appears that our previous findings would not accord substantial justice under the laws which we administer. We have such a case here. For the first time the record before us is comprehensive in the evidence which it contains upon the reasonableness of the rates assailed. Upon this record we reach the conclusion that the rate prescribed in the first Phoenix case, during the period embraced in these complaints, was unreasonable and that a lower rate would have been reasonable during that period."

And in this Court the Interstate Commerce Commission argued (284 U.S., pp. 379-80):

"In the present case, there are the added considerations that the finding of the Commission as a result of which reparation was awarded, was made upon a comprehensive record, as distinguished from a partial one, on which the prior maximum rates had been authorized, and that the rates here involved were repeatedly under fire of the shippers."

Nevertheless this Court held that the Commission could not award reparations in respect of its own rates, whether "upon the same or additional evidence as to the fact situation existing when its previous order was promulgated * * *." (284 U.S., p. 390)

Further, rates are "Commission made" rather than carrier made, within the principle of the *Arizona Grocery* case, even though no hearing is held, as long as the rates filed by the carriers are made effective by action of the Commission. In *Woodrich v. Northern Pac. Ry. Co.*, 71 F. 2d 732 (CA 8, 1934), the Court held (p. 735):

"It has been observed that the North Dakota statutes confer upon the Commission the legislative function of making, allowing, approving, revoking, and modifying rates. The Board is by positive statute directed to make rates. By order of the Commission, dated January 5, 1922, all intrastate rates then filed were continued in full force and effect until revoked, modified, or suspended by appropriate proceedings. The rates here involved were thereby approved by the Board, and having in effect been prescribed by the Board, and the rates charged having been assessed and collected in compliance with the schedules so approved and fixed by the Board, no award of damages could properly be made * * * *Arizona Grocery Co. v. Atchison, T. & S.F. Ry. Co.*, 284 U.S. 370 * * *"

In the case at bar the Commission did more than merely make effective all rates on file. It dealt with each proposed rate. It provided for refunds in some temporary certificates, and advertently omitted such provisions in others. It approved some rates as filed and reduced Standard's proposed 19.795 cent rate, basing its action upon its then recent determination in the Commission's Statement of General Policy No. 61-1 (24 FPC 818) which had been arrived at after a careful consideration of the facts relating to the industry.

The Commission has contended herein that the "without prejudice" language of the temporary certificates can be read as incorporating a condition giving the Commission the right to order refunds. If the temporary certificates, in fact, provided for the ordering of refunds, the Commission's refund order would not offend the *Arizona Grocery* rule, since the Commission would not be repealing but enforcing its prior legislative act. Whether or not the language used by the Commission in its temporary certificates can be read to authorize a refund involves a construction of that language to arrive at the Commission's intent. Here, the Commission contemporaneously stated exactly what it intended by its own language and removed any possible basis for later speculation. In its order of February 5, 1963 (I R. 5305-5311), the Commission said of its previously issued temporary certificates:

" * * * the authority was granted without condition as to refund to a price below that at which the sale would be initiated. The initial price would, however, continue to be collected until a prospective price could be determined after hearing upon the applications. * * *

* * * *

" * * * we have balanced the competing interests of producers and consumers (as well as given full consideration to the needs for certainty of natural gas companies and the public generally) by providing that while the temporarily certificated price is not subject to refund, the price during this interim period cannot exceed our ceiling price and the producers may not file for any higher price authorized by their contract pending issuance of the permanent certificate."

CONCLUSION

For the foregoing reasons, and for those stated in the brief filed on behalf of Sunray DX Oil Company, et al., we submit that the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

FRANCIS R. KIRKHAM

ROBERT H. MORRIS

225 Bush Street

San Francisco, California 94104

JUSTIN R. WOLF

DAVID B. WARD

LOUISE C. POWELL

1625 K Street, N. W.

Washington, D. C. 20006

CLAUDE PROCTOR

P. O. Box 1249

Houston, Texas 77001

*Attorneys for Standard Oil
Company of Texas, a Division
of Chevron Oil Company.*

December 13, 1967